(3)

Supreme Court, U.S.
FILED
JAN 11 2005
OFFICE OF THE CLERK

No. 04-439

IN THE
SUPREME COURT OF THE UNITED STATES

HOWARD WAYNE JOHNSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GREGORY C. NOSCHESE
Counsel of Record
WILLIAM J. MOORE
MUNSCH HARDT KOPF & HARR, P.C.
1445 ROSS AVENUE, SUITE 4000
DALLAS, TEXAS 75202
(214) 855-7500

Attorneys for Petitioner

TABLE OF CONTENTS

PAGE

INTRODUCTION 1

REASONS FOR GRANTING THE PETITION 1

A. St. John Did Not Act Reasonably Under Prevailing Professional Standards in Attempting to Locate Witnesses 1

B. Petitioner was Prejudiced by St. John's Failure to Locate Smith, Arwood, and Walston 3

CONCLUSION 5

TABLE OF AUTHORITIES

CASES PAGE

Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990) (*en banc*), *cert. denied*, 498 U.S. 950 (1990) 3

Rummel v. Estelle, 498 F. Supp. 793 (W.D. Tex. 1980) 3

Slack v. McDaniel, 529 U.S. 473 (2000) 6

Strickland v. Washington, 466 U.S. 668 (1984) 5

INTRODUCTION

In its brief in opposition, the government argues that Petitioner's Petition for Writ of Certiorari should be denied because Petitioner's counsel acted reasonably in attempting to locate witnesses that would have testified on Petitioner's behalf, and further, regardless of his counsel's actions, Petitioner was not prejudiced. The government, however, is wrong. Petitioner's counsel did not act reasonably under prevailing professional standards in locating witnesses that would have testified on Petitioner's behalf, and moreover, Petitioner was prejudiced by his counsel's failure to act reasonably.

REASONS FOR GRANTING THE PETITION

A. St. John Did Not Act Reasonably Under Prevailing Professional Standards in Attempting to Locate Witnesses

At the hearing on Petitioner's motion under Section 2255, Petitioner's trial counsel, Warren St. John, admitted that he had Dustin Arwood and Warren Walston's addresses but never personally attempted to locate them at those addresses. (R. 7:78.) If St. John would have gone to the addresses provided for Arwood and Walston, he would have been able to locate them.[1] (R. 7:13, 14, 20, & 21.) St. John knew that Arwood and Walston's testimony would have corroborated Dubresse Cookston's testimony and would have provided further evidence that Petitioner did not possess the Firestar firearm he was arrested for allegedly

---

[1] Both Arwood and Walston testified at the hearing that at the time of Petitioner's trial they lived at the addresses provided to St. John. (R. 7:13, 14, 20, & 21.) In fact, Walston's mother and stepfather and Arwood's father and stepmother still live at those addresses. (R. 7:14 & 21.)

possessing. Nonetheless, St. John never personally went to the addresses provided for them. (R. 7:78.)

St. John was further unable to testify to whether his investigator actually attempted to locate Arwood and Walston at the addresses provided for them.[2] (R. 7:79, 84 & 85.) Instead, St. John merely testified that his "investigator's practice is if he can't find somebody on the telephone, he physically drives to the location." (R. 7:79.) Moreover, when asked whether his investigator spoke to anyone at the addresses provided for Arwood and Walston, St. John responded that it was his "indication" that "whatever address [the investigator] ended up going to, he didn't talk to anybody." (*Id.*)

St. John also knew that Shane Smith was present the day Petitioner was arrested and would have been able to testify that Petitioner did not possess the Firestar firearm at the time of his arrest. Even so, St. John's search to locate Smith only began a few days before Petitioner's trial and merely consisted of St. John attempting a few telephone calls for a few minutes. (R. 7:88 & 96; RX 1.)

Based on the foregoing, St. John did not act reasonably in conducting his pre-trial investigation of the charges against Petitioner. An attorney acting reasonably under prevailing professional standards would have: (1) personally gone to the addresses provided for Arwood and Walston; (2) insisted on his investigator actually going to their addresses; (3) verified that his investigator did go to their addresses; (4) insisted that his investigator at least talk

---

[2] As set forth in the Petition for Writ of Certiorari, Petitioner disputes whether an investigator actually ever assisted St. John with Petitioner's case. (Pet. at 8-11.) Other than St. John's self-serving testimony, the government did not introduce any evidence that St. John actually sought the assistance of an investigator to locate Arwood, Walston, and Smith. (*Id.*) In fact, St. John's testimony is contradicted by the evidence. (*Id.*)

to someone at their addresses; and (5) spent more than a few minutes attempting to locate Smith. Accordingly, even giving St. John's judgment due deference, St. John's investigation to locate Smith, Arwood, and Walston was not reasonable under prevailing professional standards. *See Rummel v. Estelle*, 498 F. Supp. 793, 795 (W.D. Tex. 1980) ("Where a defendant reasonably describes potential witnesses, it is the attorney's responsibility to seek them out, ascertain their value to the defense, and, if appropriate, secure their attendance at trial."); *see also Chambers v. Armontrout*, 907 F.2d 825, 828 (8th Cir. 1990) (*en banc*), *cert. denied*, 498 U.S. 950 (1990) ("The decision to interview a potential witness is not a decision related to trial strategy.").

B. Petitioner was Prejudiced by St. John's Failure to Locate Smith, Arwood, and Walston

At Petitioner's trial, only Deputy Kendall Novak testified that Petitioner was in possession of the Firestar firearm at the time of his arrest. (R. 3:97.) No other deputies witnessed Petitioner in possession of the firearm. (R. 3:86.) Accordingly, the government's case hinged on the testimony of Deputy Novak. Without that testimony, the government would have been unable to present any evidence that Petitioner was in possession of the Firestar firearm at the time of his arrest. Deputy Novak's testimony was contradicted by Cookston's testimony that he owned the Firestar firearm and that Petitioner did not possess it when Petitioner was arrested. Accordingly, Arwood and Walston's testimony would have discredited Deputy Novak's testimony and would have corroborated Cookston's testimony.

In arguing that Petitioner possessed the Firestar firearm, the government challenged Cookston's credibility. Specifically, during its closing argument, the government repeatedly referred to Cookston as Petitioner's "buddy" or

"little buddy" and argued that Cookston's testimony could not be believed because he was obviously "covering" for Petitioner. (R:176-177 & 183-184.) Furthermore, the government used Walston and Arwood's absence from the trial to argue that Cookston was lying. Specifically, the government argued that Petitioner "could have brought the other two fellows [Walston and Arwood] that supposedly was part of this sale. They could have brought them just like he brought his little pal [Cookston] if it were so." (R. 7:176.)

The government asserts that Walston and Arwood's testimony would have been immaterial because "whether Cookston owned the firearm was irrelevant." (Opp'n at 7.) Petitioner does not dispute that an individual can be convicted under Section 922(g) without being the owner of a firearm. Nonetheless, the ownership of the Firestar firearm is a factor the jury is likely to have considered in determining whether Petitioner actually possessed the firearm.[3] Specifically, if the jury believed Cookston owned the Firestar firearm, it is likely the jury would have also believed his testimony that the firearm was in the back of his Ford Explorer, not in Petitioner's possession, at the time of Petitioner's arrest. (R. 3:136.) As set forth above, if Arwood and Walston would have testified, the jury would have been more likely to believe Cookston's testimony and less likely to believe Deputy Novak's testimony. In addition, the government would not have been able to challenge Cookston's credibility as it did and would not have been able to imply Cookston was lying based on Arwood and Walston's absence from Petitioner's trial.

The government further argues that Smith's testimony "would have had no value" because Smith had

---

[3] At the hearing on Petitioner's motion under Section 2255, St. John agreed that Cookston's ownership of the Firestar firearm was one of the defenses he asserted on behalf of Petitioner. (R. 7:91.)

"left the premises" when Petitioner was arrested. (Opp'n at 4 & 8.) The government, however, fails to inform the Court that when Smith "left the premises" he had merely walked down to a neighboring business and that only "two to three" minutes had elapsed between the time he last saw Petitioner until the time Petitioner was arrested. (R. 7:62.) Accordingly, Smith's testimony would have had value. In particular, Smith would have been able to testify that he was working with Petitioner on a vehicle outside of the audio auto store just minutes before Petitioner was arrested, and Petitioner did not possess the Firestar firearm as alleged. (R. 7:56-60.) Smith would have further testified that Petitioner was wearing elastic shorts that would not have supported the firearm. (*Id.*)

With Smith's testimony that Petitioner was not in possession of the Firestar firearm and Arwood and Walston's testimony that Cookston owned the firearm, there is a reasonable probability that there would have been a different result in the outcome of Petitioner's trial. *See Strickland v. Washington*, 466 U.S. 668, 685 (1984).

CONCLUSION

Based on the evidence presented in this matter, reasonable jurists would find the district court's assessment of whether St. John provided ineffective assistance of counsel by failing to conduct an adequate investigation of the

charges against Petitioner debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner therefore respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

GREG C. NOSCHESE
Counsel of Record
WILLIAM J. MOORE
MUNSCH HARDT KOPF & HARR, P.C.
1445 Ross Avenue, Suite 4000
Dallas, Texas 75202
(214) 855-7500

Attorneys for Petitioner